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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 567.

SPIELMAN MOTOR SALES COMPANY, *Appellant*,

v.

WILLIAM C. DODGE, District Attorney, *Appellee*.

SUPPLEMENTAL BRIEF OF APPELLEE ON JURISDICTION.

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March 28, 1935.

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In The

Supreme Court of the United States

October Term, 1934.

No. 567.

Spielman Motor Sales Company, *Appellant*,

v.

William C. Dodge, District Attorney, *Appellee*.

SUPPLEMENTAL BRIEF OF APPELLEE ON JURISDICTION.

STATEMENT OF THE CASE.

This case arises on direct appeal from the decision of a specially constituted District Court of three Judges in the Southern District of New York, dismissing a Bill of Complaint against the District Attorney of New York County seeking to enjoin him from the enforcement of the Code of Fair Competition for the Motor Vehicle Retailing Trade under the statute of the State of New York known as the Schackno Act which is quoted in full at p. 10, Appendix B, Vol. 2 of our original brief. The appeal was docketed on December 8, 1934, and probable jurisdiction noted on December 10th, 1934. A supplemental record was filed February

23rd, 1935. Subsequent to the filing of the supplemental record briefs on the merits were filed by both parties. Neither brief discussed the jurisdiction of the lower Court to entertain the bill of complaint or the jurisdiction of this Court to entertain the direct appeal.

The case came on for argument on March 11th, 1935, and during the course of the argument questions regarding jurisdiction were raised by the Court. The Court directed that briefs be filed on the question of jurisdiction of the three Judges under Section 266 of the Judicial Code (U. S. C. Title 28, section 380), on the propriety of the direct appeal from the decree of the District Court under that Section and also with respect to the jurisdiction of the Federal Court as a Court of Equity upon the allegations that are presented by the record. The case was thereupon continued pending further order of the Court.

This brief is filed pursuant to the foregoing direction of the Court. In addition we have discussed the questions relating to the supplemental record which were raised during the oral argument.

SUMMARY OF ARGUMENT.

POINT I. The District Attorney of New York County is an officer of the state within the meaning of Section 266 of the Judicial Code. (pp. 6-25)

Historically the Attorney General of the State was the prosecuting officer of New York County, being succeeded in 1813 by a district attorney who continued to exercise the same functions.

The District Attorney continues, in special cases, as an assistant of the Attorney General.

The District Attorney has complete authority of all prosecutions for crimes and offenses cognizable in the Courts of New York County; and in misdemeanor cases (violations of the State Recovery Act are misdemeanors) is the only officer who can prosecute in the name of the People of the State.

The decisions of the New York Courts classify the district attorney as an officer of the State.

Fellows v. *Mayor*, 8 Hun. 484.
People v. *Nicoll*, 32 N. Y. S. 279.
Lincoln Constitutional History of New York, pp. 529, 722.

Cases holding section 266 inapplicable on account of the character of the defendant officers are limited to those against officers acting for and on behalf of a local subdivision of the state where the subject matter is only of local interest.

Ex parte Collins, 277 U. S. 565.
Ex parte Public Bank, 278 U. S. 101.
Henrietta Mills v. *Rutherford County*, 26 Fed. (2d) 799.
Pender County v. *Garysburg Manufacturing Co.*, 50 Fed. (2d) 732.
Pleasant v. *M. K. & T. R. Co.*, 66 Fed. (2d) 842.

Here the statute is of statewide application and the question of its validity is one of the most important occupying and dominating contemporary thought and attention.

The District Attorney of New York County is acting for and on behalf of the State, representing it in the performance of a state function and exercising a part of the sovereign power of the state, and even though considered a local officer, is an officer of the state in the performance of the functions which this suit seeks to enjoin.

The Attorney General can not institute prosecutions for misdemeanors and the act of joining him as a party would not give jurisdiction to a three judge court, and unless the District Attorney is considered an officer of the State, Section 266 would be inapplicable to suits to enjoin statutes of New York State in a class of cases of the highest importance to the State.

POINT II. The supplemental record should be accepted and the appeal considered as one from a decree entered after final hearing and upon the findings of fact contained in the supplemental record. (pp. 26-30)

All proceedings taken were by consent of all parties and the findings were entered *nunc pro tunc* as of a date preceding the final decree.

The supplemental record supplies findings of fact which should have been entered at the time of the decree.

> *Public Service Commission* v. *Wisconsin Telephone Company*, 289 U. S. 67.
> *Bordens Farm Products Company* v. *Baldwin*, 293 U. S. 163.

Omissions may be supplied by *nunc pro tunc* orders entered by consent of the parties.

> *Insurance Company* v. *Boon*, 95 U. S. 117, 123-127.

The findings of fact entered by the lower court are merely the recording of conclusions of fact at which the court must have arrived as the basis for the opinion rendered herein.

Hearings upon application for preliminary injunction may be treated by consent of the parties as final hearing and findings entered upon the evidence presented by the affidavits filed.

> *Hines Trustees* v. *United States*, 263 U. S. 143, 145.

The supplemental record presents a complete record upon which the questions of constitutionality may be determined in the light of the application of the statute to the facts and avoids the delays incident to futile appeals from interlocutory orders.

> 10 *American Law Institute Proceedings*, 33-34.

There is no precedent which prevents acceptance of the supplemental record.

POINT III. The general equity jurisdiction of the federal courts may appropriately be exercised in this case. (pp. 30-34)

Appellee filed motion to dismiss and objected to the juristion of the Court below on the ground that the relief sought was prohibited by Section 265 of the Judicial Code and that appellant had an adequate remedy at law.

When the lower court assumed jurisdiction, appellee being desirous of facilitating a final decision upon the validity of the statute and codes which he is enforcing in New York County, agreed to the entry of findings of fact as upon final hearing.

In so doing appellee intended to waive the general jurisdictional questions which had been raised by his motion to dismiss.

Reynes v. *Dumont*, 130 U. S. 354, 395.
Singer Sewing Machine Co. v. *Benedict*, 229 U. S. 481, 484.
American Mills Company v. *American Surety Company*, 260 U. S. 360, 363.

If findings of fact in the supplemental record are to be given effect the case is brought within the rule permitting equity to enjoin institution of criminal procedings.

Ex parte Young, 209 U. S. 123.
Hygrade Provision Co. v. *Sherman*, 266 U. S. 497, 500.
Truax v. *Raich*, 239 U. S. 33, 37-39.
Packard v. *Banton*, 264 U. S. 140, 143.
Terrace v. *Thompson*, 263 U. S. 197, 214.

This case presents a question of vital importance which should be decided in order to remove uncertainty and doubt which are seriously interfering with the adequate enforcement of Codes of Fair Competition and appellee therefore does not press the jurisdictional objections.

POINT I.

JURISDICTION OF THE THREE JUDGE COURT.

The District Attorney of the County of New York has continuously, practically from the date of the creation of the office, considered himself a State officer. He has consistently maintained that position both in Court proceedings and in his representations to the Legislature of the State of New York. For that reason he did not object to the jurisdiction of the Statutory Court on the ground that the defendant was not within the class of persons described in Section 266 of the Judicial Code. The appellee believes that the action of the District Court in convening a Court of three Judges was proper and that a direct appeal from the decision thereof lies to this Court.

It will be shown that historically and functionally the position of the District Attorney as a State officer is clearly supported, and that the decisions of the Courts of New York State have formally determined that such is his position.

History.

Upon the organization of New York as a State in 1777, the office of Attorney General existed, that of District Attorney did not. The Attorney General was the chief legal representative of the people in the courts and had statewide jurisdiction over all prosecutions. In 1796 New York State was divided into seven districts outside the County of New York and to each an assistant Attorney General was appointed. In New York County the Attorney General continued to officiate personally as the public prosecutor.

The office of District Attorney is derived from that of the Attorney General. At its inception he was designated an assistant attorney general and was appointed for districts. The office of District Attorney was first created by Chapter 146 of the Laws of 1801; the incumbents were appointed to conduct criminal prosecutions in the same districts as those for which the assistant attorneys general had been appointed. The district attorneys so created in

1801 were the successors of the assistant attorneys general, with the same powers and duties. The Attorney General remained the public prosecutor for the City and County of New York. By this Act the Attorney General could likewise be directed to conduct general prosecutions in any of the districts, and the District Attorney of the district was required to assist him.

With the growth of population and the development of the State, the seven districts during this period of regional attorneyships were increased to thirteen. The Attorney General himself continued to exercise all functions of prosecution in the County of New York until 1813. The direct succession of the office of the District Attorney of the County of New York, in place of that of the Attorney General, was accomplished by Chapter 66 of the Laws of 1813, which provided for the appointment of a District Attorney for the district designated as the City and County of New York, in addition to the others that had been previously created by the Act of 1801, and subsequent amendments. The District Attorney was required by the Statute of 1813 to conduct all criminal prosecutions in the County of New York; the Attorney General was relieved from personal attendance unless directed by the Governor or a Judge of the Supreme Court to attend.

By Chapter 283 of the Laws of 1818, it was provided that a District Attorney be appointed for each county of the state. The appointment of these District Attorneys was made by the Governor and the Council of Appointment until the Constitution of 1821 when the County Courts were vested with the power of appointment. The Constitution of 1846 made the office an elective one, and it so continues today. (See Constitution of 1894, Article X, Subdivision 1; Appendix A, p. 35.)

Thus the office of District Attorney originated as an assistant of the Attorney General, the functions of the District Attorney of New York County being performed by the Attorney General himself from 1777, when the state gov-

ernment was formed, to 1813 when provision was first made for a District Attorney of New York County. In special cases and when the Governor requires the Attorney General to attend any particular cause the District Attorney continues to be the assistant of the Attorney General. See: *Lewis* v. *Carter*, 220 N. Y. 8, 12-14; *People* v. *Kramer*, 33 Misc. 209, 212-216; Lincoln's Constitutional History of New York, Vol. II, Chapter 9, Article 5—State Officers, Section 2, pages 526-531.

Duties and Functions of the District Attorney.

By Chapter 283 of the Laws of 1818, which provided a district attorney for each County, each District Attorney was clothed with complete authority to conduct all prosecutions for crimes and offenses cognizable in the Courts within his jurisdiction including all offenses against State Statutes. A general provision of this character, prescribing the duties of the district attorneys, was continued in force from time to time, and is now contained in the County Law (Laws of 1909, Chapter 16, Appendix p. 41). The general provision in the County Law does not apply to the District Attorney of the County of New York. Other Statutes of general application make it clear that the District Attorney of New York County is the prosecuting officer and all crimes triable in the Courts within the County of New York must be prosecuted by him (see Appendix 42):

The District Attorney is the only officer who ordinarily enforces a State statute within the County of New York. The Attorney General of the State when so required by the Governor may prosecute particular cases in any County, but a formal authorization by the Governor is necessary. (Executive Law, Section 62, Subd. 2, Appendix A, p. 38; *People ex rel. Osborne* v. *Supervisors*, 168 App. Div. 765, 767). There are also some special classes of cases which the Attorney General is authorized to prosecute in all of the Counties such as crime against the elective franchise; but prosecutions for violation of the State Recovery Act

are not within these special classes. When acting in such special cases or upon requirement of the Governor, the Attorney General or his deputy becomes the chief prosecuting officer for the case and the District Attorney is his assistant. (Executive Law, Section 62, *supra.*)

The State Recovery Act does not designate what officer shall enforce the law through prosecution of offenses that may be committed. Only in the event that the Statute specifically designates the Attorney General as the enforcing officer, would there be any duty resting upon him. In the absence of specific designation, the duty of the enforcement of the State's criminal statutes rests upon the District Attorney and upon no one else.

Considering all of the statutes together, it is clear that the District Attorney of New York County is the sole officer charged with the duty of enforcing by Criminal proceedings State Statutes (subject to the special exception already noted) in the Courts of New York County. If the Attorney General participates in any such prosecutions, he may do so only when formally required by the Governor.

The Decisions of the State Courts.

In *Fellows* v. *Mayor*, 8 Hun. 484, it was held that an Assistant District Attorney was a State officer.

The Court said on this point:

> "The question presented in this case is whether the plaintiff was or was not a state officer while holding a position as assistant district attorney. It is conceded that the district attorney is a state officer. It could not well be questioned. (Rev. Stat., Vol. 1, p. 96, Edn. Vol. 1, p. 98, paragraph 15.) • • • "

Further speaking of assistant district attorneys, the Court said on page 486:

> "• • • They are connected with and made a part of the department of an *officer of the state*, connected with its judicial system and performing many of his duties

with the same effect as if he discharged them personally. They are his assistants *and not officers of the City or County.*"

In a later case in 1891, the Supreme Court in New York County also held that the District Attorney was a State officer; *People ex rel Lyon* v. *Nicoll*, 32 N. Y. S. 279. In that case the Court denied an application for mandamus to compel the District Attorney to reinstate the relator to a position held by him in the District Attorney's office, the application being based on Chapter 119 of the Laws of 1888 which forbade the discharge of a veteran from any position by appointment in any City or County. With respect to the claim that the position was one in a county, the Court said on page 280:

"* * * Upon the other question namely, the one of law raised, the application must be denied. The district attorney's office is not a public department or a department of public works, but a state office, classified by the Revised Statutes as a judicial office. 1. Rev. St. (Banks & Bros., 8th Ed.), page 369; *Fellows* v. *Mayor*, etc., 8 Hun. 484. The case of the relator is not therefore within the operation of Chapter 119 of the Laws of 1888."

The statute* relating to public officers in force at the time of the decisions in the *Fellows* and *Nicoll* cases above quoted, was contained in Chapter V, of the Revised Statutes, pertinent excerpts from which are set forth in the Appendix. (pp. 36-38) That statute classified civil officers in four classes, namely, legislative, executive, judicial and administrative. District attorneys for each county were listed in the class of judicial officers. Section 15 of Title I

*The statute referred to in both of the above quotations was that provision of Chapter V of the Revised Statutes which classified the district attorney of the several counties as "in the class of judicial officers" (See Appendix, p. 36). The reference to paragraph 15 at page 98 of Edmonds' Statutes cited in the quotation from the first of the above cases, was from Chapter V, Title IV, Section 15 which provided for the appointment and qualification of a district attorney. (See Appendix, p. 37)

of Chapter V provided that certain officers, including district attorneys, were so far local, as to require the residence of every person holding such office within the county in which the duties of his office are required by law to be executed. (See Appendix, pp. 36-37.)

This classification of district attorneys as judicial officers and the provision last mentioned, to the effect that district attorneys were local officers in the sense above indicated, was contained in the statutes at least as early as 1859 (See Banks & Brothers, Fifth Edition, Section 13) and continued in substantially the same form until 1892 when the Public Officers Law in substantially the same form as at present was enacted. The new Public Officers Law became Chapter VII of the Revised Statutes instead of Chapter V. It is now Chapter 47 of the Consolidated Laws. This statute abandoned the four classes of officers and by Section 2 defined all public officials as either "state officers" or "local officers". (See Appendix p. 39.)

The definition of state and local officers as contained in the present Public Officers Law was based upon the territorial extent of the jurisdiction of the respective offices rather than upon the nature of the functions they exercised. This is evident not only from the language of the definition itself but from the context of the subsequent sections in the Public Officers Law. The only occasion for the use of the terms defined is to prescribe the residential requirement for officers (Section 3) and to fix the place for filing records relating to the various offices. In defining the term "local officer" there are three classifications, namely, (1) every other officer who is elected by the electors of a portion only of the state, (2) every officer of a political subdivision or municipal corporation of the state and (3) every officer limited in the execution of his official functions to a portion only of the state. Only those officers falling within the second of the three classes would necessarily be officers of a subdivision of the state as distinguished from officers of the state. Those falling within the first or third of the above

classes might be officers of the state having a local jurisdiction or they might be officers of a subdivision of the state. The definition does not determine in which group they should be placed. Thus while the district attorney of New York County would come within the term "local officer" as defined, it is entirely consistent with the definition to consider him an officer of the state whose jurisdiction is limited to a local subdivision of the state and who is elected by a portion only of the state electorate.

In cases arising since the enactment of this statute and relating to the District Attorney there has not been any occasion to determine whether the District Attorney was an officer of the State from the standpoint of the nature of the functions he exercised.

In the first case, *People ex rel. Gardinier* v. *Supervisors,* 134 N. Y. 1, the question was whether the County should bear the expense incurred by the District Attorney in extraditing a fugitive from justice. The Court said that the District Attorney was a County officer and had been such since 1818 (the year that provision was made for the appointment of a District Attorney for each County instead of one for each of the several districts). The opinion of the Court however, clearly indicated that the District Attorney was performing a State function in extraditing the fugitive. The decision was merely that under the statutes allocating expenses as between County and State, expenses of this particular character were to be borne by the County.

In *People ex rel Eldred* v. *Palmer,* 154 N. Y. 133, 137, there was no discussion as to whether the District Attorney of Kings County was a State or a County officer. The Court referred several times to the District Attorney and other County officers, but the case did not call for any decision as to the character of the office held by the District attorney.

In *People ex rel Crane* v. *Taylor,* 17 Misc. 505, 508; 40 N. Y. S. 321, the question was whether or not the District Attorney was a City officer; it was held that he was not a

City officer but was described as a County officer. However, here again, there was no occasion for considering the question as to whether he should be considered an officer of the State rather than an officer of the County.

The question has been considered by the Attorney General of the State (Opinions Attorney General 1924, p. 119). There the question was whether a District Attorney might accept an increase in compensation authorized during his term of office. The Attorney General reached the conclusion that whether the District Attorney be considered a County officer or a State officer, he was unable to accept the increased salary. On the question of whether the District Attorney was to be considered a State officer, the Attorney General said:

> "It has been held that a District Attorney is a State and not a County officer. Fellows v. Mayor, 8 Hun. 484. This decision was never appealed, and there has been no definite adjudication of the point. Its theory seems sound, but it is not necessary to discuss it under the terms of the present inquiry."

From the foregoing review of the statutes and decisions, it seems clear that the definition of state and local officers contained in Section 2 of the Public Officers Law cannot be conclusive upon the question here presented, as to whether the District Attorney of New York County is an officer of the State within the meaning of Section 266 of the Judicial Code. The classification provided in the Public Officers Law was clearly based upon the extent of territorial jurisdiction. Surrogates who are elected by the electors of a portion only of the electorate of the State and whose jurisdiction is confined to a single County are held to be judicial officers of the State. See *Prendergast* v. *Coholan*, 101 Misc. 712; 166 N. Y. S. 263; affirmed without opinion 226 N. Y. 636.

It is apparent as a matter of history that the Attorney General of the State of New York once exercised all the

essential functions of the present office of District Attorney. He continued to exercise these functions throughout the State until 1801 and in New York County until 1813. The growth of the State and the consequent increase in public prosecutions required a division of the Attorney General's paramount authority into smaller units and among a number of men and this division followed county lines. The power of each District Attorney, within his own jurisdiction, was not less than that theretofore possessed by the Attorney General and the exercise of that power was limited only geographically by the district boundaries. In all other respects the District Attorney was, as the Attorney General had been before him, a State Officer, charged with the enforcement of the State laws and the prosecution of any violation of those laws which occurred within his jurisdiction.

In Lincoln's Constitutional History of New York (1822-1894), Vol. 2, Chapter 9, the author in the section entitled "State Officers," says:

> "The Supreme Court in Fellows v. New York, 8 Hun. 484, (1876) held that the office of district attorney was a state office, and a part of the state judicial system. The public officers law (1892) defines a local officer as one 'elected by the electors of a portion only of the state.' This clearly includes the district attorney, but notwithstanding this definition he must still be deemed a part of the judicial system of the state, and therefore, in a general sense, a state officer. The definition in the public officers' law should doubtless, be limited to its apparent purpose of classifying certain officers as distinguished from others designated as state officers, and the definition need not be construed as an attempt to define the status of the district attorney in his relation to other parts of the judicial system. The evolution of the office from that of the attorney general, whose place he takes and whose functions he performs in the county, shows that, although the method of selection has been changed from state to local authority, the inherent quality of the office has not been

changed, and it may still be classed among state officers, except with reference to the method of choosing an incumbent. The legislative intent on this subject is further manifest from the executive law (1892) which makes it the duty of the attorney general, whenever required by the governor, to attend any court of oyer and terminer, appear before the grand jury and take charge of a criminal prosecution then pending; and while so attending for this purpose he shall exercise all the powers conferred on the district attorney, and that officer become subordinate to the attorney general in such a case, and subject to his direction" (pp. 529-30).

Again in Volume 4 of the same work on pages 722-723, the author states:

"The district attorney is a state officer and an assistant appointed by him is also a state officer. The district attorney is an officer of the state connected with its judicial system."

Thus the district attorney from the standpoint of the historical development of the office, the nature and character of the functions exercised, and the classification of duties as between State officials and County officials, is an officer of the State in the prosecution of offenses committed against the State.

Section 266 of the Judicial Code.

Section 266 of the Judicial Code (U. S. Code, Title 28, Section 380) provides:

"No interlocutory injunction suspending or restraining the enforcement, operation or execution of any statute of a state nor restraining the action of any officer of such state in the enforcement or execution of such statute, * * * shall be issued or granted by any justice of the Supreme Court, or by any District Court of the United States, or by any Judge thereof, or by any Circuit Judge acting as District Judge, upon the ground of the unconstitutionality of such statute,

unless the application for the same shall be presented to a Justice of the Supreme Court of the United States, or to a Circuit or District Judge, and shall be heard and determined by three judges, of whom at least one shall be a Justice of the Supreme Court or a Circuit Judge, * * * Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the Governor and to the Attorney General of the State, and to such other persons as may be defendants in the suit: * * * An appeal may be taken direct to the Supreme Court on an order granting or denying, after notice and hearing, an interlocutory injunction in such case * * *. The requirements respecting the presence of three judges shall also apply to the final hearing of such suit in the District Court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

In *Ex parte Public Bank*, 278 U. S. 101, 104, the foregoing section was construed as follows:

> "It follows that, giving effect to the phrase in question, Section 266 requires the concurrence of two things in order to give the three-judge court jurisdiction: (1) the suit must seek to have a state statute declared unconstitutional, or that in effect, and (2) it must seek to restrain the action of an officer of the State in the enforcement of such statute" (p. 104).

In that case it was held that the Collector of Taxes of the City of New York was not such "an officer of the State" when seeking to collect taxes assessed pursuant to a State statute but for the sole use of the City.

In *Ex Parte Collins*, 277 U. S. 565, it had been held that the three-judge court was not required to hear an application for preliminary injunction on a bill of complaint to enjoin a municipality and its officers and a contractor from proceeding under a resolution adopted by the City directing the paving of a street. In that case the Court said:

"And likewise it has been held that the section does not apply where, as here, although the constitutionality of a statute is challenged, the defendants are local officers and the suit involves matters of interest only to the particular municipality or district involved. Despite the generality of the language, we think the section must be so construed" (p. 568).

Commenting upon the reasons for the enactment of Section 266 of the Judicial Code and its several amendments, the Court continued:

"Congress realized that in requiring the presence of three judges, of whom one must be a Justice of this Court or a circuit judge, it was imposing a severe burden upon the federal courts. The burden was imposed because Congress deemed it unseemly that a single district judge should have power to suspend legislation enacted by a State. That the section was intended to apply only to cases of general importance is shown by the provision that notice of the hearing must be given to the Governor and the Attorney General—a precaution which would scarcely be deemed necessary in a suit of interest only to a single locality. Support for that view is found also in the provision for a stay of the suit in case there shall have been brought in a court of the State a suit to enforce the statute or order. That the provisions of Section 266 applied to cases of unusual gravity was recognized by Congress in 1925, when, in limiting the right of direct appeal from the District Court to this Court, it carefully preserved that right in cases falling within the section. Cases like the present are not of that character. If the temporary injunction had been issued, the result would have been merely to delay a municipal improvement. Though here the alleged unconstitutionality rests in the enabling statute, the case does not differ substantially from one where the sole claim is that a city ordinance is invalid. Moreover, the enabling act is not itself being enforced within the meaning of Section 266. That act merely authorizes further legislative action to be taken by the city, as by the resolution here in question. It is

> that municipal action, not the statute of a State, whose 'enforcement, operation, or execution' the petitioner seeks to enjoin.

The only doubt that can exist as to whether the instant case falls within the provisions of Section 266 is as to whether the District Attorney of New York County is "any officer of such state." This question was expressly left open by the opinion of the Court in *Ex Parte Public Bank, supra*, when the Court said:

> "Our attention is directed to several cases disposed of under Section 266, where this Court passed on the merits although the suits were against local officers. We do not stop to inquire whether, at least in some of these cases, the so-called local officers in fact represented the state or exercised state functions in the matters involved and properly might be held to come within the provision of Section 266 now under review" (p. 105).

Decisions Prior to Ex Parte Public Bank.

The other cases to which the Court referred in the above quotation, included a suit against the District Attorney of New York County to restrain enforcement of a provision of the New York Rent Law of 1920, *Marcus Brown* v. *Feldman*, 256 U. S. 170. There the District Attorney was joined with other defendants. The other defendants were tenants in a building and the District Attorney was the only public official named as a defendant. Only by reason of his inclusion could the jurisdiction of the three-judge court and the direct appeal to this Court be sustained. There the relief sought against the District Attorney was to enjoin him from enforcing the provisions of Chapter 951 which made it a misdemeanor for a lessor to wilfully fail to furnish services required by the lease. There as here, the object of the suit was to prevent the District Attorney from prosecuting for misdemeanor. The question of the character of the District Attorney's office was not discussed in the

Court's opinion and apparently not raised in the pleadings or argument by the parties.

The earlier cases* also include three other suits in which the District Attorney of New York County was a party, namely, *Packard* v. *Banton*, 264 U. S. 140; *Hygrade Provision Company* v. *Sherman*, 266 U. S. 497; and *Tyson* v. *Banton*, 273 U. S. 418. In all of these cases other parties, instantly recognizable as state officers, were joined as parties defendant. In the first two cases the Attorney General was joined and in the last, the Comptroller of the State. In the last case specific relief was sought against the Comptroller of the State and he was unquestionably a proper party. However, in the other two cases, no special relief was sought against the Attorney General and in view of the fact that the sole duty of prosecuting for misdemeanors rests upon the District Attorney of the County where the offense is committed, it seems doubtful whether the Attorney General was a necessary or proper party. Certainly relief against him alone could not have prevented prosecution by the District Attorney of New York County and in the absence of any duty on the part of the Attorney General to prosecute for the commission of the misdemeanors defined by the statutes there in question, the jurisdiction of the three-judge Court and the direct appeal to this Court could not have been supported simply by the inclusion of a

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*Other earlier cases involving prosecuting officers in other States in which this Court assumed jurisdiction of a direct appeal and passed upon the merits, include the following: *Douglas* v. *Noble*, 261 U. S. 165, in which the sole defendants were the prosecuting attorney and the deputy prosecuting attorney for King County, Washington; *Gulf Fisheries Company* v. *MacInerney*, 276 U. S. 124, in which the sole defendant was the District and County Attorney for Galveston County, Texas; *Fenner* v. *Boykin*, 271 U. S. 240, in which the sole defendants were the Solicitor General of the Atlanta Judicial Circuit and the Sheriff of Fulton County, Georgia. The Solicitor General was evidently the prosecuting officer for a district embracing several counties of the State. *Cline* v. *Frink Dairy Company*, 274 U. S. 445, where the sole defendant was the District Attorney for the City and County of Denver, Colorado; *Rast* v. *Van Deman*, 240 U. S. 342, where all the prosecuting attorneys and tax collectors of the various counties and circuits of Florida were defendants.

In none of these cases was there any discussion in the opinion of the Court regarding the character of the office of the defendant and an examination of the record in the several cases indicates that no question in relation thereto was raised by the pleading or by the briefs.

state officer against whom no relief could be granted. See *Oklahoma Gas Company* v. *Packing Company*, 292 U. S. 386, 391. It should be noted, however, that none of these questions were raised by the parties either in brief or on the pleadings. In *Packard* v. *Banton*, the bill of complaint (paragraph 6) alleged that defendants, as the law enforcing officers of the State of New York intended to enforce the provisions of the law and had announced that they would prosecute if the law was not complied with. The allegations of this paragraph were expressly admitted by the answer of the defendant, Attorney General. *In Hygrade Provision Company* v. *Sherman*, the bills of complaint alleged that the Attorney General was threatening to enforce the law, and the defendants filed motions to dismiss.

Cases Subsequent to Ex Parte Public Bank.

The question of the character of a defendant's office has been presented in two cases since *Ex Parte Public Bank* but has not been expressly decided. In both cases the defendants were chief police officers and not prosecuting attorneys. In *Broad-Grace Arcade Corporation* v. *Bright, et al*, 284 U. S. 588 (per curiam), a suit was brought against the Mayor, the Director of Public Safety and Chief of Police of Richmond, Virginia, to enjoin the enforcement of the Virginia Sunday Observance statute. In the lower court jurisdictional questions were raised but not decided, the opinion stating:

> "The jurisdiction of the court with reference to the amount involved, the character of the defendants as state or municipal officers, and the right of the complainant to equitable relief, has been questioned; but these matters need not now be discussed, because we are of the opinion that, on the merits, the complainant is not entitled to the relief which it now seeks." (48 Fed. (2d) 348, 349).

In the statement in support of jurisdiction filed by the appellant in this Court, the point was made that the appellee, especially the Chief of Police, was a state officer, citing *Sherry* v. *Lumpkin*, 127 Va. 116, 124; *Burch* v. *Hardwicke*, 30 Gratt. (Va.) 24 and Section 2991 of the Virginia Code. Appellee did not dispute the proposition so advanced. By per curiam opinion, this Court affirmed the order denying an interlocutory injuction,

> "but without prejudice to the power and duty of the District Court, as specially constituted, to inquire and determine whether the Court has jurisdiction both in relation to the amount involved in the controversy (citing cases) and with respect to the right of complainant to maintain this suit in equity."

The fact that this Court in its order of remand referred to only two of the three jurisdictional questions mentioned by the lower court, omitting any reference to the question of the character of the defendant Chief of Police as a state officer gives rise to the possible inference that the Court was of the opinion that the defendant in that case was an officer of the State within the meaning of Section 266 of the Judicial Code.

In *Ratta* v. *Healy*, 288 U. S. 593, 289 U. S. 701, suit was brought against the Chief of Police of Manchester, New Hampshire, to enjoin enforcement of the New Hamphire hawkers and peddlers statute which imposed a penalty for selling without a license in the form of a fine of not more than $200.00 to be equally divided between the State and the Town in which the offense was committed. In the Court's order noting probable jurisdiction (288 U. S. 593), the Court directed argument upon the question, among others,

> "whether the defendant-appellant is a state officer within the meaning of Section 266 of the Judicial Code as amended."

That question was argued in the briefs of both parties but it was not decided as the appeal was dismissed for want of jurisdiction on the ground that the application for interlocutory injunction had not been pressed but had been waived and there was, therefore, no ground for direct appeal to this Court. (289 U. S. 701.)

The Rule Applied to the Present Case.

From the foregoing decisions, the rule as developed to date appears to be that a suit should not be heard by three judges when the suit is against an officer acting on behalf of a political subdivision of the state and the subject matter is of interest only to such subdivision and not to the state as a whole. The cases holding a three-judge court unnecessary are limited to cases of that character. In *Ex parte Public Bank, supra,* the suit was against the Tax Collector acting for and on behalf of the City of New York seeking to collect taxes for the sole benefit of the city. In *Ex parte Collins, supra,* the suit was against a municipality to enjoin the paving of a street, a matter of strictly local interest. In *Henrietta Mills Company* v. *Rutherford County,* 26 Fed. (2d) 799, *Pender County* v. *Garysburg Manufacturing Company,* 50 Fed. (2d) 732 and *Pleasant* v. *M. K. & T. R. R. Co.,* 66 Fed. (2d) 842, the suits were against counties and officers acting for and on behalf of the county to collect county taxes.

It has never been held that an officer of limited jurisdiction when acting for and on behalf of the state in the performance of a state function was not within the term "officer of the state" as used in Section 266. The proper construction of that term is the officer charged with the enforcement of the state statute. The implication of the statement in the opinion of this Court in *Ex parte Public Bank,* namely:

> "We do not stop to inquire whether, at least in some of these cases, the so called local officers in fact rep-

> resented the state or exercised state functions in the matters involved and properly might be held to come within the provision of Section 266 now under review."

is that even local officers should be included within the term when performing the functions of the state. This view is supported by *Suncrest Lumber Company* v. *North Carolina Park Commission*, 29 Fed. (2d) 823, where the Circuit Court of Appeals of the Fourth Circuit held that members of the North Carolina Park Commission were officers of the state within the meaning of Section 266. That decision was based on the proposition that the defendants there occupied positions created by the state law which involved the exercise of a portion of the sovereign power of the state and with the performance of which the public is concerned.*

Certainly a criminal prosecution for violation of a state law brought in the name of the people of the State is the exercise of a part of the sovereign power of the state and a prosecuting officer in the performance of such duties is exercising a state function and acting for and on behalf of the state.

In the case at bar the sole defendant named in the bill of complaint is the District Attorney for the County of New York. The object of this suit was to restrain the enforcement of the state statute, Chapter 781 of the Laws of 1933 of the State of New York, an act of state-wide application. This statute is not limited in any way to "matters of interest only to the particular municipality or district in-

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*The Court there said:

> "And when we consider the reason and spirit of the statute, which has been incorporated in the Judicial Code as section 266, we think that defendants are clearly officers of the state within its meaning. That statute was enacted because it was thought unseemly that one District Judge should stop the officers of a state in the enforcement of its laws, and thereby in effect set aside the deliberate act of its Legislature. The defendants here have been expressly designated by the Legislature to carry out the park project upon which the state has embarked in co-operation with the state of Tennessee and the national government. They represent, not a county or locality, as in the Henrietta Mills Case, *supra*, but the state itself, and an injunction restraining them would in effect restrain the action of the state, and would set aside the action of the state Legislature." (29 Fed. (2d) 824.)

volved." (*Ex parte Collins, supra,* 277 U. S. 565, 568.) In view of the fact that practically all industry within the State of New York has been compelled by the State Recovery Act to adjust and substantially modify its methods of operation, the determination of the validity of the statute is a matter of grave and general importance throughout the entire State. The question involved is indisputably one of the most important constitutional questions pending for decision by reason of its direct relationship to the National Recovery program. The constitutionality of the New York State Recovery Act which is either substantially similar to or identical with that of statutes adopted by twelve other States as well as the corollary proposition whether the specific Code rules and regulations adopted pursuant to it are in violation of the due process clause of the Federal Constitution, is one of the most important questions occupying and dominating contemporary thought and attention. The conclusion that the statute whose validity is herein attacked falls surely and definitely within the class of those indicated to be covered by Section 266 of the U. S. Code is inescapable.

It has already been pointed out that the Attorney General of this State has no function in the prosecution of crimes, except when specially required by the Governor or specifically designated in the Statute itself. If it is determined that the District Attorney of New York County is not an officer of the State, within the meaning of Section 266 of the Judicial Code, there will never be any occasion for invoking the jurisdiction of a three judge court in restraining the enforcement of a New York Statute, except when the statute itself imposes the duty of enforcement upon a state officer other than the regularly constituted prosecuting officials.

The duty of enforcement of State statutes has uniformly been placed in the hands of the District Attorney. Only in rare and unusual instances has the Attorney General or

any other State officer been specified in the statute as the enforcement agent.

The exercise of the power of special request on the part of the Governor has been made only upon extraordinary occasions. The cause has invariably been corruption, neglect of duty and the general breakdown in the performance of his functions by a specific District Attorney. Furthermore, the powers of the Attorney General are limited by Subdivision 2 of Section 62 of the Executive Law to attending a term of the *Supreme Court* or appearing before the grand jury thereof. The prosecution of misdemeanors cannot be instituted before the Supreme Court of the State,* which is the only Court in which the Governor is authorized to direct the Attorney General to appear in charge of criminal prosecutions. Obviously, therefore, the Attorney General can perform no function in the enforcement of this statute or any other statute when violation thereof constitutes only a misdemeanor.

Even were he joined as a party defendant with the District Attorney the jurisdiction of the Statutory Court could not for that reason attach because the Attorney General would be an unnecessary defendant against whom no relief could be granted. See: *Oklahoma Gas Company* v. *Packing Company, supra.*

Certainly the District Attorney, in the performance of his duties in the enforcement of State statutes and the prosecution for violations thereof, must be considered an officer of the State. Any other conclusion would operate to defeat the intent of Congress in enacting Section 266 and would frustrate the operation of that section in connection with a class of cases of the highest importance to New York State as a whole.

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* See Title III, Sec. 22, Code of Criminal Procedure of State of New York.

POINT II.

THE SUPPLEMENTAL RECORD.

The decree denying the preliminary injunction and dismissing the Bill of Complaint was entered October 18, 1934 (R. 273). The appeal was allowed by order entered November 13, 1934 (R. 274), and was docketed December 8, 1934 (R. 280). On February 1, 1935, a stipulation was entered into between the parties including the Attorney General of the State of New York (R. (S) 4) that the hearing on the application for a preliminary injunction and motion to dismiss should be deemed a final hearing on the merits, treating the affidavits and exhibits as the evidence upon such final hearing, and that the parties submit proposed findings of fact and conclusions of law to be entered by the lower Court *nunc pro tunc* as of October 15, 1934 (R. 2-3). That Court entered an order giving effect to this stipulation (R. 1-2). The findings of fact (R (S) 13-38) and conclusions of law (R (S) 38-43) contemplated by the stipulation and order were entered on February 16, 1935, *nunc pro tunc as* of October 15, 1934, a date preceding the date of the final decree, and the supplemental record was filed in this Court on February 23, 1935.

All of the proceedings shown by the supplemental record were taken by consent of the parties. In taking these steps the parties were seeking to avoid "the delays incident to futile appeals from interlocutory orders" (10 American Law Inst. Proceedings, 33-34). The hearing on the motion for preliminary injunction and the voluminous affidavits and exhibits submitted by both parties had developed the facts as fully as would have been possible upon a final hearing. The opinion of the lower Court had discussed fully all issues of substance raised in the suit and had decided the case on the merits. There was no reason to believe that the final hearing would develop any further facts or would cause any change in the opinion of the lower Court.

The parties therefore agreed, in order to present to this Court a record based upon adequate findings with no facts essential to the decision of this Court upon the application of the statute to the facts wanting, that the hearing already had should be deemed a final hearing on the merits and the lower Court should be requested to enter findings of fact and conclusions of law as upon a final hearing.

The amendment of Section 266 of the Judicial Code invites the procedure followed in the present case. Originally, Section 266 required the Statutory Court to hear and pass upon the application for a preliminary injunction only, and thereupon to refer the matter back to a single district judge for final hearing. In its amended form, however, the statute provides that the requirement respecting the presence of three judges shall also apply to the final hearing of such suit in the District Court. It is obvious that one of the chief purposes of the amendment was to eliminate the unnecessary and burdensome task of duplicating the presentation of evidence and holding a second hearing when there had already been resolved upon the first hearing all of the pertinent and essential facts at issue. In the majority of cases that seek to determine the validity of State statutes there are not presented any sharp issues of fact. The basic facts are not such as can be altered or modified by testimony whether written or oral. Usually, as here, the facts are matters of public record and not susceptible of dispute.

In the present case most of the findings of fact found by the Court below were agreed upon by the parties. As to the balance there can be no doubt that there was contained in the record clear and sufficient evidence for their support. The appellant nowhere in its brief attacked any of the findings of fact made as not being adequately supported by the evidence introduced, nor has it been suggested by anyone that upon a second hearing based upon oral testimony the Court below would have resolved the facts in any different fashion. Before the Statutory Court all parties

agreed upon the futility of a further hearing (R. (S) 2-3) and admitted its pointlessness insofar as accomplishing a modification of the findings that the Court below might make.

There is precedent for considering a hearing upon application for preliminary injunction and motion to dismiss as a final hearing and treating the affidavits and exhibits submitted as the evidence upon final hearing; *Hines' Trustees* v. *United States,* 263 U. S. 143. Such procedure unquestionably might have been taken in this case if the Court had remanded the case to the statutory court to permit the cause to proceed to final hearing and for findings of fact and conclusions of law as required by Equity Rule 70½ (*Bordens Farm Products Company* v. *Baldwin,* 293 U. S. 163). On such remand the parties could have entered into the same stipulation that they did and upon the entry of the findings of fact and conclusions of law, a new decree on final hearing might have been entered. From such decree a direct appeal would lie to this Court and that would present almost identically the same record as the present supplemental record. The procedure followed by the parties herein avoids the delay incident to a remand and a second appeal and accomplishes exactly the same result on the present appeal as would be accomplished by two appeals, had the parties waited until a remand of the case to take the steps that they did.

That the lower Court had reached a conclusion on the questions of fact presented by the evidence is clearly indicated by the detailed discussion of the facts contained in the Court's opinion (R. 265-273). To the extent, therefore, that the findings of fact represent omissions of findings appropriate to the interlocutory proceeding, their entry is a compliance with the rule laid down by this Court, *Public Service Commission* v. *Wisconsin Telephone Company,* 289 U. S. 67, 70, and supplies the findings which the Court below must have arrived at as the basis of its opinion.

While it has been held that a statement of facts after removal to the Appellate Court filed without consent of the parties and apparently without hearing must be ignored; (*Generes* v. *Bonnemer*, 7 Wall. 564, 565) this Court has permitted the filing of special findings of fact by a *nunc pro tunc* order after the expiration of the term at which the judgment was entered; *Insurance Company* v. *Boon*, 95 U. S. 117, 123-127. In the case last cited the Court makes a distinction between findings of fact and a bill of exceptions. With respect to the latter it has been held that the Court's power does not exist after the expiration of the term in which the judgment was rendered or the time as extended. See: *Jennings* v. *Philadelphia, Baltimore and Washington Railway Company*, 218 U. S. 255; *Michigan Insurance Bank* v. *Eldred*, 143 U. S. 293; *Exporters* v. *Butterworth Judson Company*, 258 U. S. 365.

There is no occasion for applying strict or technical rules governing the procedure before the Special Statutory Court which is a special creation of Congress for the purpose of hearing cases which are usually of substantial public importance. The rules of procedure are not express and should be implied in such manner as will permit prompt disposition upon the merits of these questions of public importance.

The findings of fact in the present case are unusually clear and complete. They are specifically founded upon voluminous evidence contained in the sworn proofs introduced before the Court below. They definitely and unqualifiedly satisfy the test made by this Court in *Borden* v. *Baldwin*, *supra*, where it was said:

> "• • • We held that before the questions of constitutional law both novel and of far reaching importance were passed upon by this Court 'the facts essential to their decision should be definitely found by the lower Courts upon adequate evidence.' "

Nothing further could be done to more appropriately or perfectly prepare this case for final disposition.

We submit that there is no rule or precedent that would require the Court to refuse recognition of the supplemental record. While the procedure may have been somewhat unusual, it was taken throughout with the full consent of all parties including the Attorney General of the State of New York upon whom notice was served as required by Section 266 of the Judicial Code; it was approved by the lower Court; it results in presenting to this Court a complete record upon which questions presented may be determined in the light of the application of the statute to the facts; and it avoids the delays incident to futile appeals from interlocutory orders. It accomplishes the result suggested as desirable by the Chief Justice in his address to the American Law Institute when he said:

> "In this highly important class of cases it is desirable that final hearings should be expedited and that the delays incident to futile appeals from interlocutory orders should be avoided." (10 Amer. Law Institute Proceedings 33-34. See also 47 Harvard Law Review 795, 820-821.)

The supplemental record should be considered as a part of the record on this appeal and the appeal should be treated as one from a final decree upon the merits, after final hearing.

POINT III.

IS THE PRESENT CASE WITHIN THE GENERAL EQUITY JURISDICTION OF THE FEDERAL COURT?

In the Court below appellee filed a motion to dismiss (R. 263-264) and raised the question as to jurisdiction of the Court to hear the bill of complaint. Appellee urged particularly that the bill of complaint and the relief sought were prohibited by section 265 of the Judicial Code (U. S. C. Title 28, Section 379), and that appellant had an adequate and complete remedy at law. These questions were fully

discussed at the hearing before the Statutory Court and upon briefs filed after the hearing.

The lower Court resolved these jurisdictional questions against the appellee without considering it necessary to discuss those points in its opinion. When the appeal was taken, appellee was desirous of facilitating a final decision upon the exceedingly important question of the validity of the Code provisions which he was enforcing by numerous proceedings in the County of New York, and concluded to accept the lower Court's views upon the jurisdictional questions. The appellee strongly felt a clear public duty to assist in the early determination of the constitutional questions presented by this case. The uncertainty that can only be resolved by the ultimate decision of this Court was and is seriously interfering with and gravely impairing the conduct and operation of industry in one of the largest commercial centers of the nation, New York County.

Therefore, by the stipulation agreeing to consider the hearing on the application for a preliminary injunction and motion to dismiss as a final hearing on the merits and to treat the affidavits and exhibits introduced upon such hearing as the evidence on final hearing, and by stipulating to the entry of findings of fact *nunc pro tunc*, appellee intended to waive the jurisdictional objections raised by its motion to dismiss. See: *Reynes* v. *Dumont*, 130 U. S. 354, 395; *Singer Sewing Machine Co.* v. *Benedict*, 229 U. S. 481, 484; *American Mills Company* v. *American Surety Company*, 260 U. S. 360, 363. Accordingly, appellee did not argue these questions upon the brief filed in this Court. Undoubtedly the Court may raise these jurisdictional questions upon its own motion, even though appellee might be barred from doing so by reason of this waiver.

It has frequently been stated that the general rule is that equity will not interfere to prevent the enforcement of a criminal statute even though unconstitutional. However, there have been many exceptions to this general rule. See: *Ex Parte Young*, 209 U. S. 123; *Truax* v. *Raich*, 239 U. S.

33, 37-39; *Packard* v. *Banton*, 264 U. S. 140, 143; *Terrace* v. *Thompson*, 263 U. S. 197, 214, and see also *Kennington* v. *Palmer*, 255 U. S. 100, 101, and cases referred to in footnote.

In *Hygrade Provision Co.* v. *Sherman*, 266 U. S. 497, 500, this Court accepted the conclusion of the lower Court that the appellants were entitled to equitable relief if the statutes there under review were unconstitutional, basing such acceptance upon a liberal view of the decisions mentioned which included a number of those above cited.

It would be difficult to attempt a reconciliation of the cases which are held to be within the exception to the general rule and those to which the general rule is applied. Each case apparently turns upon the particular facts there found. In *Ex Parte Young, supra*, one of the earliest cases sustaining the exception to the general rule, the penalties for violation were not cumulative penalties, but were recurring penalties being separate penalties for the sale of each ticket above the rate allowed by the Act. In a number of other cases there were recurring penalties rather than cumulative penalties as the basis for equitable jurisdiction. In *Terrace* v. *Thompson, supra*, equity jurisdiction was sustained although the case involved only a single proposed transaction, namely, the lease of a parcel of land to an alien in violation of the Alien Land Law. There the Court held that the threat of the law enforcement officers prevented the owner and proposed lessee from dealing with one another and that they were not obliged to take the risk of prosecutions, fines and imprisonment and loss of property in order to secure an adjudication of their rights.

While the pleading leaves much to be desired and may perhaps require some favorable inferences to support it, a fair conclusion seems to be that the pleader intended to make allegations that would bring this case within the exception to the rule. Whether or not it succeeded in doing so by its pleading, the facts disclosed by the affidavits appear to support the case as a proper one for equitable jurisdiction and the findings of the Court below apparently

recognized and accepted appellant's evidence in this respect.

The Court below found that there was a threat of prosecution (R. (S) 15-16) and appellant was prevented by the Code under threat of penalties from conducting its business as it desired and as it would otherwise do (R. (S) 16); that the appellant had invested vast and considerable sums of money in the development of its business which had resulted in the establishment of a patronage of great monetary value (R. (S) 38); that the appellant is one of the largest motor vehicle retail dealers in the City of New York, operating four branches and employing eighty employees (R. (S) 13-14); and that the appellant had no adequate remedy at law and could have relief only in a Court of Equity (R. (S) 38). To all these findings appellee agreed.

Therefore, if the findings of fact contained in the Supplemental Record are given effect, appellee is hardly in a position to object now to the general equitable jurisdiction assumed by the Court below and the objections initially made by the motion to dismiss may be deemed to have been abandoned by the stipulation and agreement to these findings of fact.

Appellee is not in sympathy with that attitude of some prosecuting officials who seek to delay or avoid the test of a regulatory statute. Had appellee's motion to dismiss been sustained by the Court below on jurisdictional grounds the statute could have been tested by the criminal proceeding which appellee was ready to institute and that case would have been well on the way to final decision by the highest Court of the State of New York, or by this Court. But if the present proceeding is to be dismissed now for want of jurisdiction and the case begun anew in the State Court, final decision upon the validity of the State statute is likely to be postponed so long that the statute will expire by its terms before its validity is determined. For these reasons

appellee has been disposed to waive the jurisdictional questions presented by it in the Court below and does not press them now.

Respectfully submitted,

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Washington, D. C.,
March 28, 1935.

APPENDIX A.

EXCERPTS FROM CONSTITUTION AND STATUTES OF NEW YORK.

STATE CONSTITUTION (ADOPTED 1894).

Article V—Section 1.

The comptroller and attorney-general shall be chosen at a general election, at the times and places of electing the governor and lieutenant-governor, and shall hold office for the same term as the governor and lieutenant-governor.

Article X. Subdivision 1. Sheriffs, county clerks, district attorneys and registers; election, term, etc. Removal by governor.

Sheriffs, clerks of counties, district attorneys and registers in counties having registers, shall be chosen by the electors of the respective counties, once in every three years and as often as vacancies shall happen, except in the counties of New York and Kings, and in counties whose boundaries are the same as those of a city, where such officers shall be chosen by the electors once in every two or four years as the Legislature shall direct. Sheriffs shall hold no other office and be ineligible for the next term after the termination of their offices. They may be required by law to renew their security, from time to time; and in default of giving such new security, their offices shall be deemed vacant. But the county shall never be made responsible for the acts of the sheriff. The Governor may remove any officer, in this section mentioned, within the term for which he shall have been elected; giving to such officer a copy of the charges against him, and an opportunity of being heard in his defense.

STATE STATUTES.

PUBLIC OFFICERS LAW IN EFFECT AT TIME OF DECISION IN FELLOWS V. MAYOR (1876) AND PEOPLE V. NICOLL (1891).

CHAPTER V.

Of the Public Officers of this State, other than Militia and Town Officers; their election or appointment; their qualifications; and the tenure of their offices.

TITLE I.

Of the number, location and classification of the public Officers of the state.

Section 1. There shall be elected or appointed, in the manner hereinafter declared or prescribed, the following civil officers, who shall be arranged in classes to be denominated legislative, executive, judicial and administrative; but this classification shall not be construed as defining the legal powers of the officers, that shall be assigned to either class.

1. In the class of legislative officers.

* * * * * * * * *

2. In the class of Executive officers.

* * * * * * * * *

3. In the class of Judicial Officers.

* * * * * * * * *

A clerk, a sheriff, a surrogate and a district attorney for each county;

* * * * * * * * *

4. In the class of Administrative officers.

* * * * * * * * *

Sec. 15. The following officers, namely: sheriffs, clerks of counties, coroners, district attorneys, marshals of cities, the clerk of the court of oyer and terminer and general

sessions in New York, the register and clerk of that city, police justices and assistant justices in that city, and their clerks are so far local, as to require the residence of every person holding such office, within the county or city, in which the duties of his office are required by law to be executed.

Title II.

Of Legislative Officers.

* * * * * * * * *

Title III.

Of Executive Officers.

* * * * * * * * *

Title IV.

Of Judicial Officers.

Article First.

Of Judicial Officers Appointed by the Governor and Senate.

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Article Second.

Of Judicial Officers Appointed by Courts of Justice.

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Sec. 15. District attorneys are appointed by the judges of the County Courts of the respective counties. No person shall be appointed a district attorney, unless he be at the time a counsellor at law of the supreme court; but if there be no such counsellor residing in the county, or none willing to accept the office, an attorney at law may be appointed.

(Law of 1818, p. 306, sec. 4; 1824, p. 314, sec. 2).

* * * * * * * * *

Sec. 68. Sheriffs, clerks of counties, including the register and clerk of the city and county of New York, coroners, and district attorneys, shall be chosen by the electors of the respective counties, once in every three years and as often as vacancies shall happen. Sheriffs shall hold no other office, etc. * * *

EXECUTIVE LAW.

(Laws of 1909, Chapter 23)

Section 62. *General duties.* The attorney-general shall:

Subdivision 1. Prosecute and defend all actions and proceedings in which the state is interested, and have charge and control of all the legal business of the departments and bureaus of the state, or of any office thereof which requires the services of attorney or counsel, in order to protect the interests of the state, but this section shall not apply to any of the military department bureaus or military offices of the state.

Subdivision 2. Whenever required by the governor, attend in person, or by one of his deputies, any term of the supreme court or appear before the grand jury thereof for the purpose of managing and conducting in such court or before such jury such criminal actions or proceedings as shall be specified in such requirement; in which case the attorney-general or his deputy so attending shall exercise all the powers and perform all the duties in respect of such actions or proceedings, which the district attorney would otherwise be authorized or required to exercise or perform; and in any of such actions or proceedings the district attorney shall only exercise such powers and perform such duties as are required of him by the attorney-general or the deputy attorney-general so attending. In all such cases all expenses incurred by the attorney-general, includ-

ing the salary or other compensation of all deputies employed, shall be a county charge.

Section 62.—General duties (as amended by L. 1921, Ch. 592 and L. 1927, Ch. 8, sec. 3).

3. Upon the request of the governor, secretary of state, comptroller, superintendent of public works or commissioner of taxation and finance, prosecute every person charged by either of them with the commission of an indictable offense in violation of the laws, which such officer is specially required to execute, or in relation to matters connected with his department (as amended by Laws 1921, Ch. 592 and Laws 1927, Ch. 8, section 3).

PRESENT PUBLIC OFFICERS LAW.

Chapter 47 of the Consolidated Laws.

(Laws of 1909, Chapter 51)

ARTICLE I. Short Title; *Definitions.*

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Section 2.—Definitions.—The term "state officer" includes every officer for whom all the electors of the state are entitled to vote, members of the legislature, justices of the supreme court, regents of the university, and every officer appointed by one or more state officers, or by the legislature, and authorized to exercise his official functions throughout the entire state, or without limitation to any political sub-division of the state, except United States senators, members of Congress, and electors for president and vice president of the United States. The term "local officer" includes every other officer who is elected by the electors of a portion only of the state, every officer of a political subdivision or municipal corporation of the state, and every officer limited in the execution of his official functions to a portion only of the state. The office of a state officer is a state office. The office of a local officer is a local office.

Sec. 3. *Qualifications for holding office.* No person shall be capable of holding a civil office who shall not, at the time he shall be chosen thereto, be of full age, a citizen of the United States, a resident of the state, and if it be a local office, a resident of the political subdivision or municipal corporation of the state for which he shall be chosen, or within which the electors electing him reside, or within which his official functions are required to be exercised.

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LAWS PRIOR TO 1909 PRESCRIBING DUTIES OF DISTRICT ATTORNEYS.

(Laws of 1818, Chapter 283.)

It shall be the duty of the several district attorneys to attend the courts of Oyer and Terminer and Jail Delivery and General Sessions of the Peace to be from time to time, held within the Counties for which they are or shall be appointed respectively and to conduct all prosecutions for crimes and offenses cognizable in the said Courts.

(Note: The foregoing provision was continued in force in substantially the same form (Edmonds Statutes, 1869, p. 355; Banks & Brothers 7th Edition, 1882, p. 970) to and including Section 89 of Chapter XII of the Revised Statutes. (Banks & Brothers, 8th Edition, 1889, p. 1066, which is shown below.)

Section 89. It shall be the duty of every district attorney to attend the Courts of Oyer and Terminer and Jail Delivery and General Sessions, to be held from time to time in the County for which he shall have been appointed, and to conduct all prosecutions for crimes and offenses cognizable in such Courts.

(Note: The foregoing provision was repealed by the County Law of 1892 which was superseded by the present County Law, Chapter 16 of Laws of 1909.)

COUNTY LAW.

(Laws of 1909, Chapter 16.)

Section 2.—Application of this chapter. This chapter shall not apply to the county of New York, except as hereinafter specifically provided, and except that provisions of the code of civil procedure in force on April 14th, 1921, applicable to the county of New York and substantially reenacted into this chapter as a result of the revision of the code of civil procedure in the year 1920 shall continue to apply to such county.

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Section 200. Election, appointment, term of office and undertaking of district attorney.

There shall continue,

1. To be elected in each of the counties, a district attorney who shall hold his office for three years from and including the first day of January succeeding his election;

2. To be appointed by the governor, a district attorney, when a vacancy shall occur in such office, and the person so appointed shall hold the office until and including the last day of December succeeding the first annual election thereafter at which such vacancy can be lawfully filled.

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4. It shall be the duty of every district attorney to conduct all prosecutions for crimes and offenses cognizable by the Courts of the County for which he shall have been elected or appointed; except when the place of trial of an indictment is changed from one county to another, it shall be the duty of the district attorney of the county where the indictment is found to conduct the trial of the indictment so removed, and it shall be the duty of the district attorney of the county to which such trial is changed to assist in such trial upon the request of the district attorney of the county where the indictment was found.

(Note—By reason of the provision of Section 2 expressly excepting the County of New York from the application of the county law, the provision of sub-division (4) of Section 200 prescribing the general duties of the District Attorney does not apply to the District Attorney of New York County. There appears to be no other statute prescribing in general terms the duties of the District Attorney of New York County. However, other statutes of general application make it clear that the District Attorney of New York County is the prosecuting officer for that County and that all crimes triable in the courts within the County of New York must be prosecuted by him. See the sections of the Code of Criminal Procedure shown below.)

CODE OF CRIMINAL PROCEDURE.

Section 222. Crimes; how prosecuted. All crimes prosecuted in a supreme court, or in a county court, or in a city court, must be prosecuted by indictment. But, where a defendant has been held to answer to any of these courts, that court, or any of said courts to which he might have been held to answer, may, on the application in writing of the defendant, direct any information to be filed against him for the offense for which he stands charged.

The information shall be filed and signed by the district attorney of the county wherein the action was begun, and may be substantially in the following from: • • •

Section 276. Form of indictment. The indictment shall be signed by the district attorney, and may be substantially in the following form: • • •

Section 742. Trial by and form of information. All criminal actions in the courts of special sessions in the city of New York must be prosecuted by information made by the district attorney, on returns filed pursuant to section two hundred and twenty-one, or information filed by the district attorney in a misdemeanor case by direction of a

grand jury approved, upon order, by the court for which the grand jury was drawn. The information shall be signed by the district attorney of the county wherein the action was begun and may be substantially in the following form: • • •